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Daniel Yong Chen-I v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–163–10 OF 2018
MOHD NAZLAN J
19 MARCH 2019

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Criminal Procedure — Trial — Joint trial — Whether sessions court exercised discretion properly in ordering joint trial of three accused — Whether proving of charges against two of the accused under same securities law was relatively more complicated and time-consuming than determining the simpler charge against third accused ('A3') — Whether it was unfair and prejudicial to subject A3 to lengthy trial that might involve his co-accused — Whether evidence adduced for and against co-accused would be irrelevant and inadmissible in A3's case — Whether A3 would also face dilemma of whether or not to cross-examine prosecution witnesses testifying against his co-accused — Whether if A3 was jointly tried with his wife he would be unable to call her as witness if his defence was called — Whether even if offences against all three accused amounted to a single transaction joint trial should not be ordered if it would prejudice or cause injustice to accused

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The issue in the instant criminal revision was whether the sessions court had exercised its discretion properly in ordering a joint trial of the applicant, his wife and another person on various securities laws offences. The charge against the applicant was that he had allowed his wife ('NEF') to use his Central Depository System account to buy one million units of Hirotako Holdings Bhd shares ('Hirotako shares') and thereby committed an offence under s 29A of the Securities Industry (Central Depositories) Act 1991. Section 29A provided that all dealings in respect of deposited securities shall only be effected by the beneficial owners of such deposited securities or their authorised nominee. On the same day the applicant was charged, NEF was charged with committing four offences under s 188(2)(a) of the Capital Markets and Services Act 2007 ('the CMSA') while another person ('TGH') was charged with committing an offence under s 188(3)(a) of the CMSA. The four charges against NEF related to her purchases, in four batches, of the Hirotako shares over a seven day period (totaling one million shares in aggregate) while having insider information about a proposed takeover of Hirotako Holdings Bhd by another company. The charge against TGH was for providing that insider information to NEF knowing that NEF would buy the Hirotako shares as a result. On the respondent's application, the sessions court allowed all the charges against the three accused to be jointly tried pursuant to s 170 (read together with s 165) of the Criminal Procedure Code ('the CPC') on the

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ground that the charges were so connected as to form a single transaction. The applicant, who had opposed the application from the start, moved the High Court to exercise its revisionary powers to set aside the joint-trial order and order that he be tried separately from the others. The grounds for the applicant's motion were, inter alia, that: (a) the charges against NEF and TGH were not only under a different legislation but wholly different from, and irrelevant to, the charge that he faced. Since the charges of his co-accused were much more difficult to prove and defend, it was very likely that he would be unnecessarily caught up in a long-drawn trial which did not involve him; and (b) his right to invoke the privilege of not having to disclose, under s 122 of the Evidence Act 1950, communications that he had had with his wife (NEF) might be jeopardised if he was jointly tried with her. The respondent defended the sessions court's order on the basis that the charges against the three accused constituted one transaction that had continuity of purpose or design.

Held, setting aside the joint-trial order and allowing the applicant's application to be tried separately from NEF and TGH:

(1) Given the facts of the case, the session court's order for the joint trial of the three accused was not a proper exercise of judicial discretion. A joint trial would have prejudiced the applicant and caused a miscarriage of justice. The charge against the applicant was very different (it was far from complicated and was easily decided) from those against his two co-accused who might have to face a long and complex trial. The applicant would be burdened with the trial processes involved for the prosecution to establish its far more complicated cases against NEF and TGH and in that sense it was unfair and prejudicial to the applicant. There were complications affecting the rights and options of the applicant in relation to the examination of his wife (NEF) as a witness since she was now a co-accused in the same trial. There was also the risk of prejudice to the applicant's right to rely upon the privilege given to marital communications under s 122 of the Evidence Act 1950 (see paras 63–65 & 98).

(2) In deciding the suitability of a joint trial under s 170 of the CPC, the overriding consideration was whether the joint trial would be fair and just and that it would not prejudice the accused. Both the interests of justice and the interests of the accused had to be taken into account. An improper joinder of trials and charges was an illegality that could occasion an incurable miscarriage of justice and cause a conviction to be quashed. Even though the charges against the three accused tended to show a continuity of action and proximity of time and could be said to amount to a single or same transaction, the overriding question was whether a joint trial would prejudice or cause injustice to the accused (see paras 43 & 47–49).

(3) The evidence that the prosecution had to elicit and prove against NEF and TGH were irrelevant and inadmissible in its case against the applicant. The applicant might also have to face the dilemma of whether it was prudent for him to cross-examine the prosecution witnesses testifying against NEF and TGH or refrain from doing so since they were irrelevant to his case but at the same time concerned that it might amount to an acceptance of their testimony (see paras 54–55 & 58–61).

[Bahasa Malaysia summary

Isu dalam semakan jenayah ini adalah sama ada mahkamah sesyen telah melaksanakan budi bicaranya dengan sewajarnya dalam emmerintahkan perbicaraan bersama untuk pemohon, isterinya dan seorang lagi berhubung pelbagai kesalahan undang-undang sekuriti. Pertuduhan terhadap pemohon adalah bahawa dia telah membenarkan isterinya ('NEF') untuk menggunakan akaun Sisitem Depositori Pusatnya untuk membeli satu juta unit syer Hirotako Holdings Bhd ('syer Hirotako') dan oleh itu telah melakukan kesalahan di bawah s 29A Akta Perindustrian Sekuriti (Depositori Pusat) 1991. Seksyen 29A memperuntukkan bahawa semua urusan berkaitan sekuriti yang didepositkan hendaklah hanya dilaksanakan oleh pemunya benefisial sekuriti yang didepositkan atau penama yang diberi kuasa. Pada hari yang sama pemohon didakwa, NEF telah didakwa melakukan empat kesalahan di bawah s 188(2)(a) Akta Pasaran Modal dan Perkhidmatan 2007 ('CMSA') manakala seorang lagi ('TGH') telah didakwa melakukan kesalahan di bawah s 188(3)(a) CMSA. Empat pertuduhan terhadap NEF berkaitan beliannya, dalam empat kelompok, syer Hirotako dalam tempoh tujuh hari (berjumlah satu juta syer secara agregat) sementara mempunyai maklumat dalaman mengenai cadangan pengambilalihan Hirotako Holdings Bhd oleh syarikat lain. Pertuduhan terhadap TGH adalah kerana memberikan maklumat dalaman kepada NEF dengan pengetahuan bahawa NEF akan membeli syer Hirotako akhirnya. Atas permohonan responden, mahkamah sesyen telah membenarkan semua pertuduhan terhadap tiga tertuduh dibicarakan bersama menurut s 170 (dibaca bersama s 165) Kanun Tatacara Jenayah ('KTJ') atas alasan bahawa pertuduhan-pertuduhan tersebut begitu berhubung untuk mementuk satu transaksi. Pemohon, yang membantah permohonan itu dari mula, telah memohon Mahkamah Tinggi untuk menggunakan kuasa semakannya bagi mengetepikan perintah perbicaraan bersama itu dan perintah bahawa dia dibicarakan secara berasingan daripada mereka. Alasan usul pemohon adalah, antara lain, bahawa: (a) pertuduhan-pertuduhan terhadap NEF dan TGH bukan sahaja di bawah perundangan berbeza tetapi sama sekali berbeza daripada, dan tidak relevan dengan, pertuduhan yang dihadapinya. Oleh kerana pertuduhan-pertuduhan tertuduh bersamanya lebih sukar untuk dibuktikan dan dibela, ia berkemungkinan bahawa dia akan terperangkap dalam perbicaraan yang panjang yang tidak melibatkannya; dan (b) haknya untuk menggunakan keistimewaan untuk tidak perlu mendedahkan, di bawah s 122 Akta Keterangan 1950, komunikasi antara dia dan isterinya (NEF)

A mungkin terjejas jika dia dibicarakan bersama dengan isterinya. Responden mempertahankan perintah mahkamah sesyen dengan alasan bahawa pertuduhan-pertuduhan terhadap ketiga-tiga tertuduh merupakan satu transaksi yang mempunyai kesinambungan tujuan atau rancangan.

B **Diputuskan**, mengetepikan perintah perbicaraan bersama dan membenarkan permohonan pemohon untuk dibicarakan secara berasingan daripada NEF dan TH:

(1) Berdasarkan fakta kes, perintah mahkamah sesyen untuk perbicaraan C bersama ketiga-tiga tertuduh bukan pelaksanaan wajar untuk budi bicara kehakiman. Suatu perbicaraan bersama akan memprejudiskan epmohon dan menyebabkan keadilan yang tidak dilaksanakan. Pertuduhan terhadap pemohon sama sekali berbeza (ia tidak rumit langsung dan mudah diputuskan) daripada pertuduhan terhadap dua tertuduh D bersamanya yang mungkin berhadapan dengan perbicaraan yang panjang dan kompleks. Pemohon akan terbeban dengan proses perbicaraan yang terlibat untuk pendakwaan membuktikan kes-kes terhadap NEF dan TGH yang jauh lebih rumit dan dalam erti kata itu ia adalah tidak adil dan perjudia kepada pemohon. Terdapat komplikasi E yang menjejaskan hak dan pilihan pemohon berhubung dengan pemeriksaan isterinya (NEF) sebagai saksi kerana dia kini tertuduh bersama dalam perbicaraan yang sama. Terdapat juga risiko prejudis terhadap hak pemohon untuk bergantung pada hak istimewa yang diberikan untuk komunikasi perkahwinan di bawah s 122 Akta F Keterangan 1950 (lihat perenggan 63–65 & 98).

(2) Dalam memutuskan kesesuaian perbicaraan bersama di bawah s 170 KTJ, pertimbangan utama adalah sama ada perbicaraan bersama itu adil dan saksama dan tidak akan menjejaskan tertuduh. Kedua-dua G kepentingan keadilan dan kepentingan tertuduh harus diambil kira. Penggabungan perbicaraan dan pertuduhan yang tidak betul adalah salah laku yang akan menyebabkan keadilan yang tidak dapat dilaksanakan dan menyebabkan sabitan dibatalkan. Walaupun pertuduhan-pertuduhan terhadap ketiga-tiga tertuduh cenderung H menunjukkan kesinambungan tindakan dan kedekatan masa dan dapat dikatakan merupakan satu atau transaksi yang sama, persoalan utama ialah sama ada perbicaraan bersama akan memprejudiskan atau menyebabkan ketidakadilan terhadap tertuduh (lihat perenggan 43 & 47–49).

I (3) Keterangan bahawa pendakwaan terpaksa mendapatkan dan membuktikan terhadap NEF dan TGH tidak relevan dan tidak boleh diterima dalam kesnya terhadap pemohon. Pemohon mungkin juga harus menghadapi dilema sama ada berhemat baginya untuk memeriksa balas saksi pendakwaan yang memberi keterangan terhadap NEF dan

TGH atau menahan diri daripada berbuat sedemikian kerana mereka tidak berkaitan dengan kesnya tetapi pada masa yang sama bimbang ia mungkin merupakan penerimaan keterangan mereka (lihat perenggan 54–55 & 58–61).]

Cases referred to

Amrita Lal Hazra & Ors v Emperor (1915) ILR 42 Cal 957, HC (refd)
Chin Choy v PP [1955] 1 MLJ 237 (refd)
DPP v Kilbourne [1973] AC 729, HL (refd)
Datuk Haji Wasli bin Mohd Said v PP and another application [2006] 5 MLJ 172, HC (refd)
Emperor v Nasrullah & Ors AIR 1928 All 287, HC (refd)
Gurdit Singh v PP [1983] 1 MLJ 264 (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Krishnan v PP [1987] 1 MLJ 292, SC (refd)
Ku Izham bin Ku Adnan v PP [1998] 5 MLJ 720, HC (refd)
Liaw Kwai Wah v PP [1987] 2 MLJ 69, SC (refd)
Lim Sing Hiaw v PP [1965] 1 MLJ 85, FC (refd)
Loh Shak Mow v PP Wong Hoi Ping; Alan v PP [1987] 1 MLJ 362 (refd)
Manokaran & Anor v PP [1979] 1 MLJ 262 (refd)
Norhazeni bin Ahmad v PP [2017] 10 MLJ 471, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v Loh Ang Sing [1965] 2 MLJ 129 (refd)
PP v Muhamad Nasir bin Shaharuddin [1994] 2 MLJ 576, HC (refd)
R v Marian Grondkowski and Henryk Malinowski [1946] 1 All ER 559; [1946] KB 369, CA (refd)
R v Turner [1975] 1 All ER 70, CA (refd)
Raju a/l Dakashina Murtay lwn Pendakwa Raya [2018] 4 MLJ 413, CA (refd)
Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (refd)
Teja Singh & Mohamed Nasir v PP [1950] 1 MLJ 71 (refd)
Tennakoon D Harold v PP [1997] 4 MLJ 497, HC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 188, 188(2)(a), (3)(a)
Courts of Judicature Act 1964 ss 31, 35, 36, 37
Criminal Procedure Code ss 163, 165, 165(1), 170, 170(1), 323, 323(1), 424(1), (1)(a), Chapter XXXI
Evidence Act 1950 ss 5, 122
Securities Industry (Central Depositories) Act 1991 ss 29A, 51

Chong Loong Men (Rachel Lim with him) (Lim Chong Phang & Amy) for the applicant.

Shoba a/p Venugobal (Deputy Public Prosecutor, Securities Commission Malaysia) for the respondent.
Guok Ngek Seong (Guok Partnership) watching brief for Tan Giap How.

Mohd Nazlan J:

INTRODUCTION

[1] This is a criminal revision application filed by the applicant, who had been charged for an offence of allowing another person to use the applicant's central depository account under the securities law, against the decision of the sessions court ordering his joint trial with that person and another accused both of whom had been charged for different offences.

[2] At the conclusion of the hearing, I allowed the application, directed that the applicant be tried separately from the other two accused, and highlighted my main reasons for the same. This judgment sets out the full reasons for the decision.

KEY BACKGROUND FACTS

[3] The applicant was on 13 March 2018 charged at the Sessions Court Kuala Lumpur for an offence under s 29A of the Securities Industry (Central Depositories) Act 1991 ('the SICDA'), read together with s 51 of the same Act, and registered as Case No 62SC-9–03 of 2018. The charge reads as follows:

> That you, between 14 October 2011 and 20 October 2011 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, as the beneficial owner of Central Depository System account bearing number xxx-xxx-xxxxxxxxx ('the said account') maintained at CIMB Investment Bank Berhad had allowed one Ng Ee Fang (Singapore Passport No: E3621465N) to effect the acquisition of 1,000,000 units of Hirotako Holdings Berhad (Company No 209806-H ('Hirotako') shares in the said account, and thereby committed an offence under section 29A of the Securities Industry (Central Depositories) Act 1991 (Act 453), and punishable under section 51 of the same Act.

[4] Sections 29A and 51 of the SICDA state as follows:

> 29A Dealings in deposited securities shall be effected by beneficial owners or authorized nominees
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> All dealings in respect of deposited securities shall only be effected by the beneficial owners of such deposited securities or an authorized nominee, as the case may be.

51 General penalty

A person who contravenes or fails to comply with any of the provisions of this Act or of any regulations made thereunder shall be guilty of an offence under this Act and, where no penalty is expressly provided, shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both.

[5] The applicant as the beneficial owner of his central depository account ('CDS account') is therefore alleged to have allowed another person to effect dealings in securities using the applicant's CDS account in violation of s 29A of the SICDA. It should be mentioned that Ng Ee Fang, the person who is stated to have effected acquisitions of shares in the applicant's CDS account is the applicant's wife.

[6] On the same day the applicant was charged, relevant for present purposes, charges were also filed against two other persons. First, Ng Ee Fang ('NEF') herself was preferred with four charges under s 188(2)(a) of the Capital Markets and Services Act 2007 ('the CMSA'), and registered as Case No 62SC-(6&7)-03 of 2018.

[7] These four charges relate to her purchases of different lots of Hirotako shares on four different dates during a seven-day period in April 2011, totaling one million Hirotako shares in aggregate. It suffices that I set out only the first of the four charges which are otherwise identical but for the dates and the number of shares. The first charge reads as follows:

First Charge

That you, on 14 October 2011 at Bursa Malaysia Securities Berhad (Company No 635998-W) Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur acquired 197,000 units of Hirotako Holdings Berhad (Company No. 209806-H) ('Hirotako') shares ('the said shares') through Daniel Yong Chen-I's (NRIC No 711019-07-5493 Central Depository System account bearing number 065-001-038707659 while in possession of information that was not generally available, which, on becoming general available, a reasonable person would expect it to have a material effect on the price or the value of the said shares, such information being the proposed take-over offer by MBM Resources Berhad (Company No 284496-V) to acquire all the voting shares and outstanding warrants in Hirotako, and you ought reasonably to have known that such information was not general available and you have thereby committed an offence under section 188(2)(a) of the Capital Markets and Services Act 2007 (Act 671) and punishable under section 188(4) of the same Act.

[8] The other person charged that same day was Tan Giap How ('TGH'). His is a single charge, in respect of an offence under s 188(3)(a) of the CMSA, and registered as Case No 62SC-8–03 of 2018. The charge reads as follows:

That you, between 25 September 2011 and 20 October 2011 in Malaysia, as an insider, communicated to one Ng Ee Fang (Singapore Passport No E3621465N) information that was not generally available, which, on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of Hirotako Holdings Berhad's (Company No 209806-H) ('Hirotako') shares and you ought reasonably to have known that the information was not generally available, such information being the proposed take-over offer by MBM Resources Berhad (Company No 284496-V) to acquire all voting shares and outstanding warrants in Hirotako, and you ought reasonably to have known that Ng Ee Fang would tend to acquire the shares of Hirotako which trading was permitted on the stock market of Bursa Malaysia Securities Berhad (Company No 635998-W) and you have thereby committed an offence under section 188(3)(a) of the Capital Markets and Services Act 2017 (Act 671) and punishable under section 188(4) of the same Act.

[9] The offence under s 188(3)(a) of the CMSA, as reflected in the charge against TGH is essentially one of communicating material inside information on the relevant securities to another person, in this case alleged to be NEF, who in turn would deal in the securities by purchasing the same, namely the one million Hirotako shares, an offence under s 188(2)(a) of the CMSA.

[10] On 28 May 2018 the respondent filed a notice of application to apply for all the charges against the applicant, NEF and TGH to be jointly tried under s 170 of the Criminal Procedure Code ('the CPC') read together with s 165, which was allowed by the sessions court on 27 September 2018, which appeared to be on the ground that the charges against all the three accused were so connected together so as to form part of the same transaction.

[11] The applicant, who had opposed the application for the joint trial then filed a motion on 4 October 2018 to the High Court for a revision against the joint trial order of the sessions court. Principally, the application seeks that this court exercises its revisionary powers to examine the correctness, legality or propriety of the joint trial order of the sessions court and that the case of the applicant be tried separately from NEF and TGH.

[12] Hence the instant proceeding now before me.

ESSENCE OF THE CONTENTIONS OF THE LITIGANTS

[13] In advancing his contention that the order for joint trial by sessions court under s 170 of the CPC read together with s 165 is erroneous, the applicant principally asserted that a joint trial in the circumstances of this case will cause or may likely cause prejudice to the applicant on account of three principal reasons. First, given the facts and the offences in question, the charges against NEF and TGH are not relevant to the case against the applicant.

[14] Secondly, the applicant also maintained that as a corollary, a joint trial would also result in an inordinate delay in the trial of the applicant given that the prosecution will have to prove, and NEF and TGH will likely raise in their defence, matters which are entirely irrelevant to the applicant's case. A

[15] Thirdly, the applicant complained that a joint trial would jeopardise his fundamental rights, if not forfeit the statutory protection of spousal communication under s 122 of the Evidence Act 1950. B

[16] The respondent on the other hand, in resisting this revision application, asserted that the revisionary powers ought only to be invoked in deserving cases and that there was no error in the exercise of the discretion of the sessions court in ordering a joint trial. C

[17] Primarily, it was also argued that the instant case involving the charges against the three accused persons constitute a single or same transaction with the key test of continuity of purpose or design clearly established. The respondent disagreed a joint trial would occasion a miscarriage of justice and argued that evidence elicited from witnesses against NEF and TGH would not prejudice the defence of the applicant who is facing a charge for a different offence. D E

[18] The respondent also disagreed that a prolonged trial would prejudice the applicant and contended that there would be no forfeiture of the statutory protection under s 122 of the Evidence Act 1950. F

EVALUATION AND FINDINGS OF THIS COURT

Basis of application — Revision powers of the High Court G

[19] The powers of revision are set out in Chapter XXXI of the Criminal Procedure Code ('the CPC') and especially in ss 31, 35–37 of the Courts of Judicature Act 1964 ('the CJA'). Section 323(1) of the CPC provides as follows:

> A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court. H

[20] In the High Court decision in *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262, Abdoolcader J (as he then was) ruled that the High Court has not only extensive powers of revision in criminal proceedings under the provisions of s 323 of the CPC, 'but even wider powers conferred by s 35 of the Courts of Judicature Act 1964 ...'. I

[21] Section 35 of the CJA in turn provides as follows:

> 35 General supervisory and revisionary jurisdiction of High Court
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> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
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> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[22] The key objective of the exercise of the revision powers – which is essentially to put right a miscarriage of justice — has been aptly described by the former Supreme Court in *Liaw Kwai Wah v Public Prosecutor* [1987] 2 MLJ 69, which cited with approval the leading Indian case on this subject — *Emperor v Nasrullah & Ors* AIR 1928 All 287, in the following terms:

> *Object of revision*
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> We would observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is —
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> > ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.
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> (*Emperor v Nasrullah & Others* AIR 1928 All 287).
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> It is also clear that the High Court may examine the record of proceedings in the subordinate courts 'wherever it considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution'. (*Ramanathan Chettiyar v Subrahmanya Ayyar* ILR 47 Mad 722).
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> *Duty of High Court*
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> Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.
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> The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has

> scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

(See also the decision of the Federal Court in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565).

Revision of orders for joint trial

[23] It is the position of the respondent that the court's revisionary powers must be exercised judicially, drawing in support the case of *Tennakoon D Harold v Public Prosecutor* [1997] 4 MLJ 497 (Tab 7), where the High Court, had among others, observed as follows:

> (7) The revisionary powers of the High Court must be used sparingly and it cannot extend to all cases. As Hashim Yeop Sani J (as he then was) said in the case of *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 at p 26:
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> > The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[24] On the powers of revision in respect of joint trials, the respondent contended that the issues regarding prejudice and miscarriage of justice are premature to be considered at this stage such that there is no necessity for this court to invoke its revisionary powers. The respondent also seeks further support from the decision of the Federal Court in *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85 which concerned the issue of joint trial, in the following terms:

> ... the question of joint or separate trial of charges is, within the limits of the Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case. In the present case we can see nothing in the way of injustice or possible miscarriage of justice that could possibly be attributed to the trial of the two charges together and would justify us in interfering with the way in which Azmi J exercised his discretion in refraining to order separate trials.

[25] However, it can be quite readily appreciated that even the very passages referred to by the respondent in its written submissions as reproduced above plainly made mention of injustice to be the primary basis that justifies interference with the exercise of discretion of the trial judge ordering a joint trial. More importantly the same passages as quoted, also made it abundantly

clear that such consideration of injustice is to be examined in both the present context as well as, by use of the words such as 'whether substantial justice ... will be done' and 'possible miscarriages of justice' a potential occurrence in the future during trial.

[26] It can thus be stated that in any revision application, the question to be determined is first and foremost whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice (see also *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26).

[27] Revision powers had thus been invoked in the past vis a vis a challenge against an order for a joint trial, just like presently. In the High Court decision of *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88, a case referred to by the respondent, the accused therein filed a revision application to set aside the order for a joint trial. Harun J (as he then was) ruled as follows:

> In the event, the learned president ordered the trial to proceed on the first three charges and stayed the hearing of the fourth charge. At the request of the defence yesterday, the learned president adjourned further hearing to Monday February 26, 1979 to enable this court to give the necessary directions under s 35 of the Courts of Judicature Act 1964.
>
> At the outset, it must be said that the prosecution's concern is the legality of the trial. *Such concern is understandable in view of the Privy Council's decision Subramania Ayyar v King-Emperor and followed by Chin Choy v Public Prosecutor which held that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.* (Emphasis added.)

[28] Furthermore, in *Gurdit Singh v Public Prosecutor* [1983] 1 MLJ 264, Mohamed Dzaiddin J (later Chief Justice) held that to the extent that the High Court has before it a record of criminal proceeding, the condition precedent to its exercise of revisionary power is met.

[29] In this regard I would hold that the direction to the parties that affidavits be filed in relation to this application can be deemed to constitute the act of 'calling for the record of proceedings' within the meaning of s 35 of the CJA as well as s 323 of the CPC, in view of the fact that the evidence contained therein would sufficiently apprise this court of the proceedings in the court below.

[30] At the same time it is pertinent to state that no less significantly, affidavit evidence may be used in revision proceedings, given the provisions of s 424(1)(a) of the CPC which states:

Subject to any rules of the Court, any affidavit may be used in a criminal court if it is sworn:

(a) In the Federation before any Magistrate or Registrar

(b) ...

[31] As such, in *Ku Izham bin Ku Adnan v Public Prosecutor* [1998] 5 MLJ 720 it was held that since s 424(1) of the CPC authorised the use of affidavit in a criminal proceeding, the same is thus permitted in a revision because when a court hears a revision application and acts within its revisionary powers, it does so as a criminal court within the contemplation of s 424(1).

[32] Above all, authorities are clear in stating that the power of the High Court sitting in revision is discretionary. It is worthy of emphasis that the power must be used sparingly having regard to all the circumstances of the each particular with the overriding view to correcting or preventing a miscarriage of justice. It must be exercised judicially and within the limits of and in the spirit of the legislation (see the decision of the Supreme Court in *Liaw Kwai Wah v Public Prosecutor*).

The test for joint trials

[33] The test for determining the appropriateness of ordering a joint trial must be the relevant provisions on joint trials as contained in the CPC. The order was like the one in the instant case, granted as is usual in cases involving more than one accused is jointly tried under s 170 read together with s 165 of the CPC. The former reads as follows:

170 When persons may be charged jointly

(1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all the charges.

[34] Section 165(1) of the CPC provides the following:

165 Trial for more than one offence

(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

(2) ...

[35] Thus, the crux of s 170(1) is that the offences involving the different accused persons are committed in what is essentially the same transaction. The burden however lies on the respondent on making its application that a joint trial ought to be granted on the facts of this case (see *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129).

[36] The predominant test to be established by the prosecution applying for a joint trial to the satisfaction of the court, as to whether there is a same transaction or whether a series of acts are so connected as to form one transaction, as articulated in *Amrita Lal Hazra & Ors v Emperor* (1915) ILR 42 Cal 957, and as later applied in local jurisdiction in cases such as *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 include primarily considerations on proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

[37] Although the court considering such application will examine whether these elements constitute same transaction under s 170, it is an important proposition of law governing s 170 that the power to order a separate or joint trial is a power exercisable by the trial court (see *Jayaraman & Ors v Public Prosecutor*), the granting or refusing of which application is entirely a matter of discretion of the trial judge.

[38] Thus, where such discretion has been judicially exercised by the court, there is no basis for appellate intervention unless, as stated earlier in this judgment, it appears that a miscarriage of justice has resulted either from granting or refusing the application, as so clearly established in the leading authority on this subject in the English case of *R v Marian Grondkowski and Henryk Malinowski* [1946] 1 All ER 559; [1946] KB 369.

[39] In *R v Marian Grondkowski and Henryk Malinowski* it was unsuccessfully argued on appeal that where the key part of one accused person's defence amounts to an attack upon another accused, a separate trial should be ordered. The Court of Criminal Appeal reasoned its rejection of that argument in the following terms:

> The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in *Youth v R* [1945] WN 27 the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoners as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. (Per Lord Goddard CJ at p 732).

[40] The former Federal Court in *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85 made the same observation on the true application of the guiding principle of judicial discretion where Thompson LP held instructively as follows:

> We do not dissent from the opinion of the former Court of Appeal though, of course, it has less force where a case is to be tried by a judge alone than where it is to be tried by a judge and assessors as was the case under the 1948 Regulations. Nevertheless the question of joint or separate trial of charges, within the limits of the Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case.

The court must exercise its discretion judiciously

[41] Accordingly, a finding that there was one same transaction should not without more result in the making of an order for a joint trial under s 170 of the CPC. It is of course manifest that the very language of s 170 refers to the operative word 'may' in the first place. The discretion vested in the trial judge warrants that it be exercised judicially. This necessitates further consideration, on the facts of the case, to the extent available at that early stage, on matters of potential prejudice and the interest of justice.

[42] The High Court in *Datuk Haji Wasli bin Mohd Said v Public Prosecutor and another application* [2006] 5 MLJ 172 further described the position clearly in the following terms:

> [39] The 'same transaction' yardstick can only be tested against the charges now facing KG and WMS. I am satisfied that those offences occurred at the same time (date) and place (Fairlane Hotel in Kuala Lumpur). However, I am not convinced that the prosecution has shown as they are now duty-bound to prove that the other criteria of unity of purpose or design and continuity of action of both the accused persons are present in the charges. KG faces two charges ... On the face of these charges alone, I am doubtful if there is a nexus between them or that there was a unity of purpose or design in their acts. This court should lean in favour of this doubt and allow the accused persons the benefit of that doubt. Here I am reminded by the advice of Desai J in his judgment in *Mukerji*'s case. His Lordship said this:
>
> > I must deprecate courts' taking unnecessary risk in holding joint trials in doubtful cases. I consider it nothing short of foolishness to hold a joint trial, unless its legality is beyond dispute, and take the risk of the trial being held to be invalid by higher court. If the higher court does not order retrial, there may arise serious miscarriage of justice from the holding of the joint trial. If it orders retrial, though justice may be done ultimately, it would be done after a waste of public time and money and unnecessary expenditure and inconvenience to the parties. There can be no excuse for all this. 'The law is that a joint trial may be held and not that it must be held. A court is never obliged to hold a joint trial'. Even where it can hold it, it is open to it to hold separate trials for the various offences. A prudent judge would, therefore, always hold separate trials whenever he has the

slightest doubt about the validity of a joint trial.

[40] There is another principle brought to this court's attention by Dato' Shafee Abdullah, of counsel for KG which this court should seriously consider in deciding whether or not to exercise its discretion to order a joinder. It is this. An improper joinder of trials and charges will result in an illegality which cannot be cured. The advice of Lord Wright in *Babulal*'s case was adverted to this court by learned counsel. His Lordship said this:

> It has been taken as settled law on all sides throughout these proceedings that the infringement of s 239(d) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in *Subramania Ayyar v King-Emperor* as contrasted with the result of an irregularity, as to which *Abdul Rahman v Emperor*'s case is an authority.

[41] And in *Chin Choy v Public Prosecutor* [1955] 21 MLJ 237, Mathew CJ in echoing that principle said that (at p 238):

> In our view, there can be no doubt that the trial together of these four charges was an illegality and the trial was therefore bad. When charges are wrongly joined, the prosecutor should be asked to elect before the pleas are taken which charge or charges he wishes to proceed on, and thus avoid a trial which is illegal and bad. As a practice, charges which are not capable of being tried together should be made on separate charge sheets and the subject of separate trials.

[42] Lastly, I need also mention that if WMS and KG were jointly tried, the prosecution needs to establish the guilt of each of the accused as a separate exercise. In exercising this discretion, I need to remind myself that both the accused persons may be subjected to a long trial complicated by the admission of evidence which may be relevant to one but not to the other. If that happened, then the court may be prejudiced by evidence that would be irrelevant if they were separately tried. The evidence against WMS and KG in the case of a joint trial would certainly be jumbled together, there may be a danger that the evidence would not be separately considered on the basis of its admissibility against each accused person, as happened in *Loh Shak Mow v Public Prosecutor* [1987] 1 MLJ 362.

[43] All considered, I feel that it would be in the interest of justice that I disallow this application for a joinder.

[43] It bears repetition for it is plain from the cases cited in the immediately preceding paragraph that an improper joinder of trials and charges is an incurable illegality that renders any conviction recorded to be quashed. It may thus be again stated that the overriding consideration in the exercise of discretion to consider the suitability of ordering a joint trial under s 170 of the CPC is whether a joint trial will be fair and just, and whether the accused will be prejudiced by a joint trial. Case law authorities such as *R v Marian Grondkowski and Henryk Malinowski* [1946] 1 All ER 559; [1946] KB 369 and *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71 have established that both the interests of justice and the interests of the accused

must be taken into account. Any wrongful joinder would constitute illegality of the trial.

[44] The criticality of considering the justice of the case was also emphasised (as referred to by the counsel for the applicant in his submission) by Thompson LP in *Lim Sing Hiaw v Public Prosecutor* where His Lordship held thus:

> In the present case we can see nothing in the way of injustice or possible miscarriage of justice that could possibly be attributed to the trial of the two charges together and would justify us in interfering with the way in which Azmi J exercising his discretion in refraining to order separate trials.

[45] The English Court of Criminal Appeal in *R v Marian Grondkowski and Henryk Malinowski* [1946] 1 All ER 559; [1946] KB 369 also specified that the justice of the case in an application for joint trial requires consideration of any prejudice that may be occasioned to an accused person.

Test of unity of purpose and design

[46] The four factors as discussed in *Jayaraman* and *Amrita Lal Hazra* are 'mutually exclusive and not cumulative'. In *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129 Lee Hun Hoe JC (as he then was) held as follows:

> The usual test applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However, I do not think it is necessary that all of them should be present to make the several incidents parts of the same transaction. In my view the main test is that of unity of purpose or design.

[47] Based on the charges against all three accused, TGH, in possession of material non-public information communicated to NEF resulting in NEF purchasing the shares by using the applicant's CDS account and the applicant allowing NEF who is not an authorised nominee to acquire the said one million Hirotako shares in his CDS account on 14, 17–18 and 20 October 2011. All this suggest a continuity of action.

[48] This is especially so given that the offences stated in the charges against all three were committed at the same time: the applicant, from 14–20 October 2011, NEF on 14, 17–18 and 20 October 2011 and TGH on 25 September 2011–20 October 2011. This demonstrates proximity of time between the offences as stated in the charges.

[49] I would tend to agree with this contention of the respondent. However the important point is even if it is assumed the prosecution has shown that all the six charges against the three accused could be said to represent a single or

same transaction, the overriding question is whether a joint trial would occasion a prejudice or injustice to the applicant.

Relevance of other charges to the applicant

[50] In essence, on the basis of the charges against the applicant, NEF and TGH, the respondent as the prosecution is contending that first, TGH, as in insider in possession of the inside information had communicated the said information to NEF, in breach of s 188(3)(a) of the CMSA. Secondly, NEF after being tipped off by TGH also therefore became an insider who then acquired the shares using the CDS account of the applicant, in violation of s 188(2)(a). Thirdly, the applicant allowed the use of his CDS account by a person who is not an authorised nominee, in infringement of s 29A of the SICDA.

[51] It is apposite that the entirety of s 188 of the CMSA be reproduced, as follows:

(1) A person is an 'insider' if that person —

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

(b) knows or ought reasonably to know that the information is not generally available.

(2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —

(a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to —

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

(4) A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(5) The Minister may make regulations in respect of any particular class, category or description of persons or any particular class, category or description of transactions, relating to securities, to whom or which this section does not apply.

[52] What all this amounts to is that the prosecution would have in its case against TGH prove by adducing evidence that firstly, the information stated in the charge — which is the proposed take-over offer by MBM Resources Bhd to acquire all the voting shares and outstanding warrants in Hirotako — was inside information in that it was not generally available at the material time, and that if made generally available, would affect the price and value of the shares in question.

[53] And secondly, it would have to show that TGH was an insider, in that he was in possession of the said inside information during the material period; and thirdly TGH had communicated the said inside information to NEF, with the knowledge that NEF would likely acquire the said shares.

[54] Given such scenario that would emerge as the prosecution seek to unfold the narrative of the case against TGH, it would in my view be readily appreciated that all these evidence that the prosecution seeks to establish and the facts and testimony that would be elicited in the process are not at all relevant to the prosecution case against the applicant.

[55] It is quite manifest that these could not possibly be construed as being relevant if the applicant is being separately and singly tried. It cannot therefore morph into evidence that becomes relevant against him if the applicant is jointly tried with TGH. Further, it is trite in the law of evidence that if a matter sought to be adduced or the potential evidence is not relevant against the applicant, it plainly means, as night follows day that the same is inadmissible against the applicant.

[56] In line with s 5 of the Evidence Act 1950, relevance does not result in evidence being admissible, but it is a condition precedent to admissibility (see the English Court of Appeal decision in *R v Turner* [1975] 1 All ER 70). And not all admissible evidence is universally relevant in that admissible evidence against one accused may not be so against another or it may be admissible to rebut a defence but inadmissible to reinforce the case for the prosecution (see the House of Lords decision in *DPP v Kilbourne* [1973] AC 729).

[57] And the Supreme Court in *Krishnan v Public Prosecutor* [1987] 1 MLJ 292 said this:

A We were referred to the decision in *Poon Soh Har v Public Prosecutor* [1977] 2 MLJ 126 which relied on the locus classicus on this point in the Privy Council decision in *Makin v The AG for New South Wales* [1894] AC 57 in which it was held that it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by
B the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. *Their Lordships went on to say that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before a jury, and it may be relevant if it bears*
C *upon the question whether the acts alleged to constitute the crime charged in the indictment are designed or accidental, or to rebut a defence which would otherwise be open to the accused.*

We need hardly say that the same principle should apply where the judge was as in this case, sitting alone, and we have not lost sight of the words of caution that whilst the
D principles are easy to state it is often difficult to draw the line and decide whether a particular item of evidence is on the one side or the other. (Emphasis added.)

[58] Not only does this state of affairs unfair to the applicant as a co-accused who will have to sit through this evidence-adducing process against TGH
E which is of no relevance to the applicant, but that he would also be placed in an invidious and unenviable position of having to deal with the cross-examination process vis a vis the witnesses of the prosecution against TGH.

F **[59]** As correctly highlighted by the applicant, if he chooses not to cross examine the prosecution witnesses for the TGH charges, it would amount to an acceptance of their testimony. The former Federal Court had ruled in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of a witness's
G testimony. Yet, at the same time, there is really no reason for the applicant to cross examine these witnesses since their testimony would not be against him in any event.

[60] In its case to prove the four charges against NEF, the respondent would
H have to be established that first, she was an insider (being in possession of the said information which was not generally available) at the material time; and secondly, NEF had acquired the said shares while she was an insider.

I **[61]** But just like in the charge against TGH, the testimony to be extracted from the prosecution witnesses in respect of the charges against NEF to prove she was an insider and that she did the purchase is wholly irrelevant to the charge against the applicant. Similar dilemma on cross examination of the prosecution witnesses vis a vis NEF charges would be encountered by the applicant.

[62] This irrelevancy and consequential inadmissibility is made more manifest as the single charge faced by the applicant actually concerned an offence other than insider trading related and one under a different statute — SICDA instead of CMSA. I am mindful that the joinder provisions in s 170 of the CPC also speaks of different offences but on the facts of the instant application, the different legislation goes some way towards fortifying the irrelevancy of the testimonies of such witnesses against the prosecution case against the applicant.

[63] After all, and this is probably the most critical — the applicant is merely accused of having allowed his wife NEF to use his CDS account to purchase the said shares. It appears from the charge that the applicant's only crime is just that. It has nothing to do with the point that the applicant himself was not an insider, possibly had no knowledge that NEF traded on inside information concerning the Hirotako stock counter, or that TGH was the one who allegedly communicated the inside information to NEF. In other words, it does appear that the case against the applicant is an open and shut one. It can be easily decided. It is likely that the facts are pretty clear and far from complicated.

[64] Yet the applicant is now by virtue of the joint trial order burdened with the processes involved for the prosecution to also establish its far more complicated cases against NEF and TGH. This, in my view, is prejudicial to the applicant.

[65] No doubt, the court is able to discern the relevance of the evidence and sift and separate out what is pertinent to certain charges but not for other charges. But the point is the trial process and the manner the evidence would be adduced from the testimony of the witnesses involving all these charges against the three accused would cause a prejudice and occasion an unfairness to the defence of the applicant given the differences in the substance of the charges against the three accused.

[66] It is imperative that this court reminds itself of the salutary observation by Harun J (as he then was) in *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88 on the general requirement for separate charges to be separately tried under s 163 of the CPC as follows:

> In exercising its discretion, the court should bear in mind that the mischief of s 163 of the CPC is to prevent unfairness or embarrassment to the accused —
>
> (i) by the confusion of issues;
>
> (ii) by introduction of evidence tending to show that he is guilty of some other offence.

[67] More recently, the High Court in *Norhazeni bin Ahmad v Public*

Prosecutor [2017] 10 MLJ 471 declined to order a joint trial, and also referred to the following passage from the leading text of *Sohoni's The Code of Criminal Procedure* (1973, 19th Ed) p 2661:

> ... if it is doubtful whether a given case can be brought under its provision, it is preferable to deal with the offenders separately thereby avoiding the likelihood of any prejudice.

[68] I should repeat yet again that a misjoinder is an illegality and would occasion miscarriage of justice that cannot be cured (see also *Chin Choy v Public Prosecutor* [1955] 1 MLJ 237).

Length of trial

[69] It is quite well known that prosecution of securities laws offences, particularly market-misconduct related, necessitating proof of the elements of among others 'inside information', 'insider' and 'insider trades' would generally be lengthy and prolonged. It is only to be expected that the trial against NEF and TGH would be lengthy as it would involve voluminous documentary evidence and numerous witnesses including potentially expert witnesses as well.

[70] I thus find that one consideration that ought to have been taken into account in the exercise of discretion to determine the desirability of a joint trial is whether it would subject an accused person to a long and complicated trial as evidence not relevant to his case would be produced. Thus in *Public Prosecutor v Muhamad Nasir bin Shaharuddin* [1994] 2 MLJ 576 the High Court observed as follows:

> The other danger of a joint trial is that if no evidence is adduced against the second accused, and subsequently the second accused is acquitted, it may have worked to the prejudice of the second accused as he may have been subjected to a long and complicated trial which to a large extent may not have been relevant to him. In the Singapore case of *Loh Shak Mow v Public Prosecutor*, the High Court, on the facts of that case held that the joint trial in that case had 'occasioned in failure of justice' (at p 382).

[71] It is not clear whether this aspect on the potential for a protracted trial was raised let alone considered in the application for a joint trial at the sessions court. This is an important point, for as correctly emphasised by the applicant's counsel, as at present, the applicant is under the law presumed to be innocent, until proven otherwise.

Protected communication between spouses

[72] A key objection of the applicant to the order of joint trial against him has much to do with the position that the safeguards under s 122 of the Evidence Act 1950 conferred on the applicant and his spouse, NEF in respect of the communication between them would be adversely affected.

[73] Section 122 of the Evidence Act 1950 reads as follows:

> 122 Communications during marriage
>
> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

[74] This statutory provision creates marital privilege and for present purposes, essentially makes a witness not compellable to disclose any communication made to him or her by his or her spouse during marriage.

[75] The applicant argued that should the applicant cross examine NEF on certain communication protected as a privilege under s 122, it would thus amount to a deprivation of the statutory protection provided under that statutory provision. However, on the contrary, the applicant may again be deemed to accept the testimony of NEF should his counsel decide not to cross NEF.

[76] The applicant also contended that any examination of either the applicant or NEF on any such privileged communication would amount to an infringement of the protection conferred on spouses under s 122 of the Evidence Act 1950.

[77] However, as correctly asserted by the respondent, even if the applicant and his wife, NEF are to be tried jointly or separately, there will always be a possibility for either of them to adduce evidence that would amount to be marital communication. In that sense whether the spouses are tried separately or jointly makes no difference.

[78] Thus, in the event a situation arises where any marital communication is exposed by one spouse during trial, the counsel for the other spouse could apply to the trial court at any given time to expunge the pertinent evidence on the basis of enforcing the rights accorded to the second-mentioned spouse under s 122 of the Evidence Act 1950.

[79] The respondent referred to a recent decision of the Court of Appeal in *Raju a/l Dakashina Murtay lwn Pendakwa Raya* [2018] 4 MLJ 413 which expunged the evidence which was given by the accused person's wife as the communication took place during their marriage. It was thus held:

> [37] Kami berpendapat hakim bicara melakukan kesilapan apabila tidak mengetepikan sebahagian daripada keterangan SP14 yang berkaitan dengan komunikasi oleh perayu kepada SP14 tersebut. Keterangan yang tidak boleh diterima masuk di bawah undang-undang kekal tidak boleh diterima masuk tanpa mengira keterangan tersebut gagal dicabar atau dibantah oleh perayu. Bagaimanapun, kami bersetuju bahawa hakim bicara tidak tersalah arah dalam menerima keterangan SP14 yang tergolong di bawah keterangan langsung di bawah s60 Akta Keterangan dalam perkara perlakuan perayu dan apa yang SP14 telah melihat sendiri pada malam itu. Jika pun keterangan berkaitan komunikasi perayu kepada SP14 ditolak di bawah s122, keterangan lain oleh SP14 yang bukan pengataan-pengataan atau komunikasi perayu kepada SP14, masih boleh diterima masuk untuk diberikan nilai berat oleh hakim bicara.

[80] But the concerns expressed by the applicant are not without basis. He maintains that if there are separate trials, and the applicant be tried individually, should the prosecution call his spouse as a witness, the applicant would have the right to object on the basis of s 122. There is no such right now that both spouses are jointly tried. As co-accused, they cannot be called as prosecution witnesses.

[81] In the context of a joint trial involving two or more accused persons like presently, even if one is a material witness for the prosecution against the other, the prosecution cannot compel the first mentioned accused person to give evidence as a prosecution witness.

[82] If the trial for the applicant and his spouse NEF and TGH is separately and individually held, the inability of the prosecution to call NEF or TGH in their trial to prove the case against NEF and TGH may be of little concern to the applicant who would be facing his own charge in a different trial.

[83] More crucially for him, in the situation of him being a sole accused who is tried separately from NEF and TGH, the prosecution will have to call NEF who is accused of using the applicant's CDS account, and the applicant will be able to exercise his right to cross examine on non-marital communication or object to her being called because of the privilege under s 122.

[84] If the prosecution decides to take the risk and not call NEF at the prosecution stage, the applicant has the option whether or not to call NEF as his own witness. All that is not possible in a joint trial scenario since if defence

is called against the spouses or all three in a joint trial situation, again a co-accused cannot be called as a witness for another accused.

[85] But for the joint trial, the applicant would otherwise be able to cross examine NEF on non-marital communication and TGH (if necessary) in the applicant's own trial. This cannot now happen given the order for the joint trial. This ability to cross examine a material witness like NEF, one who is on the basis of the charge inexorably linked to the allegation against the applicant, is an essential right that is has now become non-existent in view of the joint trial.

[86] This in my view tantamount to a failure to accord an accused a fair trial at the stage of the prosecution. It prejudices the applicant and amounts to a miscarriage of justice.

[87] This does not mean that in all cases where there are two or more accused persons, a joint trial would necessarily translate into a miscarriage of justice as one accused cannot cross examine the other accused during the prosecution stage.

[88] The key is that the judicial discretion in considering a joint trial application must be carefully exercised to consider the charges against the accused persons, and how they are involved in the offences and the relationship of the charges between one and the others.

[89] I emphasise that after all, the trial judge must consider the case on the basis of the evidence admissible against each accused separately (see *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71). In the Singapore High Court decision in *Loh Shak Mow v Public Prosecutor Wong Hoi Ping; Alan v Public Prosecutor* [1987] 1 MLJ 362, the appeal was successful for the reason, among others that the trial judge did not consider the case and the appropriateness of ordering a joint trial on the basis of the evidence admissible against each accused respectively.

Onus on party seeking a joint trial

[90] It is not in doubt that it is for the party applying for a joint trial to satisfy the court why one is necessary. Thus it was stated in *Public Prosecutor v Loh Ang Sing* [1965] 2 MLJ 129 as follows:

> If the prosecution wishes to apply for joint trial it is for the prosecution to justify it. The prosecution has all the facts and should have little difficulty in making out a good case for a joint trial.

A **[91]** The respondent argued that it had on the face of the charges against the applicant, NEF and TGH, managed to show how the offences in the charges overlap with one another and justified invocation of s 170 of the CPC. And this led to the sessions court ordering a joint trial against the three.

B **[92]** It cannot be denied that the respondent did not clearly disclose in its affidavit to justify the necessity for a joint trial (other than that they form part of a same and single transaction under s 170) when the application for joint trial was made to the learned sessions court judge despite the respondent being the party duty bound to do so.

C

[93] In the instant case, the respondent submitted that the basis for its application for the joint trial and the decision by the sessions court to grant the same is that its application satisfied the continuity of purpose or design of all the charges which warranted them being considered as one same transaction
D within the context of s 170 of the CPC. That may be insufficient to withstand judicial scrutiny if prejudice to the accused is shown.

[94] I think it has to be reiterated that whilst the prosecution may well have
E been able to satisfy the court of the fulfillment of the tests on the existence of a same or single transaction vis a vis the various charges against the different accused, it is incumbent on the trial judge to ensure a proper and judicious exercise of his discretion to prevent any injustice or unfairness be occasioned to the applicant as a result of the making of an order for joint trial.

F

[95] I cannot but agree with the assertion of the counsel for the applicant that the primary consideration for a joint trial must also not be in terms of saving of time, expense and resources of the parties including the court.

G **[96]** In respect of s 170 of the CPC for example, if the tests for the application of s 170 have been fulfilled, in that it is assumed that the offences in the charges against the applicant, NEF and TGH are in the same transaction and the charges also show continuity of purpose or design, the additional but overarching criterion to be equally met is the absence of injustice and
H unfairness to any of the accused.

[97] For justice must always be done irrespective of the time dimension, or any considerations on expense and resources.

I CONCLUSION

[98] In conclusion, in my judgment, in view of the foregoing reasons, in particular the very different nature of the charge against the applicant in comparison with those against the other two accused, the potential for a long

and complex trial, and the complications affecting the rights and options of the applicant in relation to the examination of a witness who is now a co-accused in a same trial, as well as the risk of prejudice against marital communication conferred on the applicant and NEF under s 122 of the Evidence Act 1950, the order made by the sessions court for a joint trial against all the three accused, given the facts of this case, demonstrate clear omission to ensure a proper exercise of judicial discretion in considering the joint trial application.

[99] Should the joint trial be pursued, the same would be prejudicial to and constitute a miscarriage of justice against the applicant, rendering revisionary interference by this High Court inevitable and wholly warranted. At the same time, it is manifest that the prejudice resulting from a joint trial of the applicant and the other two accused would be disproportionate to the purported convenience of a joint trial.

[100] In view of the foregoing reasons, I allow the notice of motion filed by the applicant (specifically prayer 2 therein) to have the charge preferred against him to be separately tried from the other charges against NEF and TGH, and for the order for joint trial against the applicant as previously granted by the sessions court to be set aside.

Joint-trial order set aside and applicant's application to be tried separately from NEF and TGH allowed.

Reported by Ashok Kumar